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January 21, 2002

Michelle Carey, Chief
Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*; WC Docket No. 01-338 (*Triennial Review)*

Dear Ms. Carey:

Covad Communications (Covad), through its counsel, herewith writes to express its deep concerns over the possibility of the Commission's re-adopting and extending to additional UNEs the interim "use" restrictions for loop-transport combinations, otherwise known as EELs. Covad also writes to express its concerns over the possibility of the Commission adopting a proxy for a route-by-route analysis of the availability of competitive transport facilities. Specifically, Covad fears that the use of a "contestable market" proxy for transport impairment threatens to eviscerate any route-by-route analysis the Commission devises.

Covad agrees with the numerous facilities-based CLECs commenting on the issue of EELs use restrictions that the Commission's interim use restrictions have created far more pervasive and pernicious consequences than the Commission ever originally intended.[1] Covad hopes to ensure that, however the Commission ultimately disposes of this issue, facilities-based CLECs such as Covad will have the flexibility they need to offer competitive broadband telecommunications services on a non-discriminatory basis. Covad hopes to ensure that Covad and other facilities-based CLECs are not unfairly hobbled by onerous usage, record-keeping and auditing requirements, while the ILECs remain free to offer similar services under no such constraints. Furthermore, Covad hopes to ensure that any "use" restrictions devised by the Commission do not inadvertently and unfairly preclude carriers providing telecommunications services of any kind – including data and Internet access services – from accessing UNEs.

[1] *See*, *e.g.,* Letter from John J. Heitmann, Kelley Drye & Warren, to Michelle Carey, FCC, dated January 10, 2003, in WC Docket Nos. 01-338, 96-98, and 98-147.

Covad is a facilities-based provider of broadband telecommunications services. Covad collocates in every end office from which it provides service, in a total of nearly 2000 central offices located in 35 states nationwide. One of Covad's business products is a broadband T1 service offering known as TeleXtend. Covad's T1 TeleXtend product has enabled Covad to offer broadband telecommunications services to customers whose loops do not meet the physical requirements for DSL services (for example, due to excessive loop length), and also addresses the needs of users who require the reliability, priority data traffic delivery, and service level guarantees that a T1 data service offering make possible.

Covad submits that its TeleXtend product is exactly the type of competitive broadband telecommunications service offering that the unbundling provisions in the 1996 Telecommunications Act were intended to foster. Indeed, Covad's T1 services are technically distinct from traditional ILEC retail T1 services in that they use an ATM backbone instead of the ILEC's dedicated channelized network. By attaching DS1 standalone loops to its collocated ATM equipment and backhaul ATM network, Covad is able to offer end users T1 level data services more efficiently and at a lower cost than traditional channelized ILEC T1 data services. Far from being an "end-around" ILEC special access, Covad's TeleXtend product is meant to directly compete with the ILECs' special access data offerings, by offering end users a more efficient product at a lower price. It would be a travesty for the Commission to craft a regime of use restrictions that precluded Covad's ability to continue operating its TeleXtend lines, and that precluded Covad's ability to expand the market for this popular product.

Indeed, particularly worrisome for Covad is that prospect that, where use restrictions are concerned, the Commission stands poised to change the rules midstream on competitors once again. In reliance on the Commission's existing DS1 loop unbundling rules, Covad has made significant investments in its end office equipment and backhaul network to create a new T1 product offering. In addition, Covad has invested in product development, personnel and marketing. For the Commission to extend use restrictions in any form to brand new categories of UNEs, all without adequate notice,[2] would be a terrible blow if Covad were forced to withdraw its TeleXtend product as a result.

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[2] Indeed, apart from asking specific questions about the merits of its use restrictions for EELs, the Commission's NPRM in this docket asks at best a few high-level questions about the implications of imposing "commingling" and service restrictions. In no way, however, does the Commission's NPRM suggest that it is considering whether to extend EELs-type use restrictions to additional UNEs such as high-capacity standalone UNE loops. As a result, it is hardly an accident that the record has been largely devoid of comment on extending such use restrictions to standalone UNE loops. *See Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, 96-98, 98-147, Notice of Proposed Rulemaking, FCC 01-361, at Sections III.D.1 and III.D.6 (2001). *See also Florida Power & Light Co. v. U.S.*, 846 F.2d 765, 771 (D.C. Cir. 1988) (the Commission must provide notice of a proposed rulemaking "adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process."); *and MCI Telecommunications v. FCC*, 57 F.3d 1136 (D.C. Cir. 1995) (vacating and remanding FCC rules due to inadequate notice under the *Florida Power* standard). Indeed, the

Unlike accessing EELs, accessing standalone UNE loops requires the collocation of end office terminating equipment. Given that Covad and other competitors are using, and for all practical purposes must use, end office collocations to access standalone UNE loops, the prospect of such competitors bypassing ILEC special access services remains speculative at best. Indeed, it is hard to imagine how competitors such as Covad could be bypassing ILEC special access by providing their services over standalone UNE loops. Given that the access charge bypass issues underlying the Commission's EELs use restrictions remain so speculative in the context of standalone UNE loops,[3] Covad urges the Commission to decline extending use restrictions to new UNEs. It is also important to note that, in the past six years during which time competitive carriers have been allowed to provide services via unbundled DS-1 loops, the IXCs have largely not opted to do so. Instead, the IXCs have continued to provide services via ILEC special access – perhaps because the volume and term discounts large IXCs can negotiate with the ILECs allow them to obtain special access at a price point very close to the UNE price available to facilities-based CLECs like Covad. Ironically, the only parties that would be harmed by adoption of service restrictions on DS-1 UNEs would be facilities-based CLECs like Covad (and their customers), who could not obtain the volume and term discounts that the large IXCs have been able to obtain.

In fact, Covad remains hard pressed to see how even IXCs could use standalone UNE loops to bypass ILEC special access services, given that they too would be required to use collocated end office equipment to access standalone UNE loops. Nevertheless, to the extent the Commission remains concerned about the hypothetical prospects of IXC access charge bypass in the standalone loop context, the Commission always remains able to invoke its enforcement authority to deal with such speculative problems when and if they actually arise. But a regime of use restrictions on standalone UNE loops, which affects all facilities-based carriers, to avoid speculative concerns about access charge bypass by a few carriers would be a vastly over-inclusive solution in search of a very narrow, speculative problem. Given that such a problem has yet to be demonstrated even to exist, Covad urges the Commission to decline cutting out of whole cloth a new set of use restrictions for standalone UNE loops.

Covad also reminds the Commission that voice competitors are not the only facilities-based competitors making use of standalone UNE loops to provide telecommunications services. Specifically, Covad provides high-speed, always-on

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Commission's payphone compensation rules today were remanded to the Commission for lack of a sufficient logical relation between the Commission's original, and only non-defective, notice and the rules it ultimately adopted. *See Sprint v. FCC*, No. 01-1266 (D.C. Cir., decided Jan. 21, 2002), available at http://pacer.cadc.uscourts.gov/docs/common/opinions/200301/01-1266a.txt.

[3] Covad submits that the record of the *Triennial Review* proceeding is devoid of any evidence that purchasers of UNE DS1 loops create any special access bypass problems for the ILECs.

transmission links for Internet access. To provide these advanced telecommunications services, Covad purchases standalone UNE loops, including high-capacity DS1 loops, made available to competitors pursuant to section 251(c)(3) of the Act. It has been suggested that requiring the use of interconnection trunks obtained pursuant to section 251(c)(2) of the Act as a precondition for accessing UNE loops would be an appropriate means of avoiding the supposed problems of access charge bypass. Unfortunately, every ILEC would use that requirement to drive competitors like Covad out of the T1 business. Section 251(c)(2) interconnection trunks are typically purchased to exchange switched voice traffic between two LECs. Data T1 providers like Covad, however, do not exchange switched voice traffic with the ILEC. Accordingly, an ILEC might argue that Covad does not purchase what are typically regarded as section 251(c)(2) "interconnection trunks" from the ILEC – and, because it controls the facility, the ILEC would be in a position to deny Covad's access to standalone UNE loops on this basis absent regulatory intervention. Requiring the use of 251(c)(2) interconnection trunks, accordingly, would represent an enticing "gaming" opportunity for every ILEC seeking to drive its data T1 competitors out of business. Given the extraordinary gaming opportunities the existing use restrictions for EELs have created, and the absence of a demonstrable problem calling for the implementation of new use restrictions for standalone loops, Covad urges the Commission to decline from adopting new use restrictions for additional UNEs.

Covad also writes to express its concerns over the possibility of the Commission adopting a transport impairment test that relies on a "contestable market" proxy for the availability of true route-specific competitive alternatives to ILEC transport facilities. In particular, Covad, like many other facilities-based competitive carriers, fears that use of a contestable market proxy would eviscerate any route-by-route impairment analysis the Commission ultimately implements. A contestable market proxy, no matter how defined, merely demonstrates that competitive, alternative transport facilities are available along some of the transport routes within a given geographic area. Such a proxy demonstrates nothing, however, about the availability of transport alternatives throughout that geographic area. It merely assumes that alternatives will be constructed in the rest of that geographic area where they do not already exist. This overbroad assumption, however, has practically no evidentiary support in the record – nor would whatever parameters the Commission devises for a contestable market proxy. Worse, a contestable market proxy threatens to disrupt the services and business plans of competitors currently purchasing UNE transport facilities that could become de-listed even where there are no competitive alternatives available to serve their business needs. In the current climate of restricted capital markets, the contestable market proxy's assumption that competitive transport alternatives will magically be built where they do not exist in a given geographic area seems doubly counter-factual.

Moreover, Covad remains at a loss to understand what additional purpose a contestable market proxy serves beyond a route-specific analysis of competitive transport alternatives. The latter test, which many competitive carriers have suggested to the

Commission, would show that route-specific alternatives are truly available prior to delisting UNE transport facilities along a given route. Such a test narrowly addresses the Commission's goal of removing unbundling rules where competition has taken hold in the marketplace. By employing a contestable market proxy, the Commission would only obtain a result different from a route-specific analysis where there were no competitive alternatives available in the marketplace. Accordingly, Covad is at a loss to understand why a route-specific impairment analysis will not suffice to serve the Commission's purpose – unless that purpose is absurdly to eliminate market-opening mechanisms in monopoly markets. Covad continues to believe that this cannot be the Commission's goal.

Covad also urges the Commission to decline adopting a capacity-based cap on the availability of UNE transport facilities. Absent sufficiently particular evidence in the record on the levels of transport capacity that render transport deployment economical, the Commission would be merely guessing about the appropriate level of a capacity-based threshold at which competitors are no longer impaired. Covad submits that the existing record on capacity-based impairment thresholds consists merely of a few carriers' unfounded and ill-explained assertions of the threshold at which self-provisioned transport deployment becomes economical. As the Commission has learned many times over by now, the Commission picking numbers out of an industry hat is hardly a defensible approach to implementing the mandates in the 1996 Act.[4] Furthermore, determining the capacity level at which competitors can economically self-deploy transport is an intensely fact-specific and situation-specific inquiry, that can vary based on changing market-conditions, such as vacillating capital and equipment markets, geographic conditions, service mix, and customer base. Any fixed threshold adopted by the Commission could not be sufficiently narrow and responsive to these situation-specific and dynamic factors.

Covad urges the Commission to decline adopting new use restrictions for additional UNEs, such as standalone UNE loops. Instead, Covad urges the Commission to stay within the parameters of its notice and, with respect to EELs and EELs alone, address the grave unintended consequences that its existing use restrictions have already created for facilities-based competitors. In addition, Covad urges the Commission to decline from adopting any contestable market proxy for determining impairment with respect to the transport UNE. Such a proxy threatens to nullify any route-specific impairment test the Commission implements. Covad also urges the Commission to decline adopting an ill-founded capacity-based threshold for transport impairment.

[4] *See*, *e.g.*, *Texas Office of Public Utility Council v. FCC*, 265 F.3d 313, 327-28 (5th Cir. 2001) (remanding the *CALLS Order*, and holding that the FCC acted arbitrarily and capriciously in choosing $650 million as the amount of interstate access universal service funding established in its *CALLS Order*).

Respectfully submitted,

___/s/ Praveen Goyal_____

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